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No. 578

In the Supreme Court of the United States

OCTOBER TERM, 1958

A. Z. HANDFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 18–21) is reported at 260 F. 2d 890. The opinion reversing a prior conviction is reported at 249 F. 2d 295.

JURISDICTION

The judgment of the Court of Appeals was rendered on November 21, 1958. The petition for a writ of certiorari was filed on December 15, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support petitioner's conviction.

2. Whether the remarks of the government attorney in his argument to the jury constituted reversible error.

STATEMENT

On May 20, 1958, in the United States District Court for the Middle District of Georgia, petitioner was convicted on a one-count indictment for the possession of distilled spirits without payment of the tax (26 U. S. C. 5008 (b) (1), 5642). He was sentenced to imprisonment for two and a half years. On appeal, the conviction was affirmed. A prior conviction had previously been reversed for improper argument by government counsel. 249 F. 2d 295.

The only witness for the government was L. W. Johnson, Sheriff of Baker County, Georgia, and a former Georgia revenue officer (R. 4, 5). With two state revenue agents, Sheriff Johnson at 9:15 p.m. on July 23, 1956, parked his car beside petitioner's house, facing a tractor which stood between petitioner's house and garage (R. 5). When the car stopped, petitioner came toward it from the back of his house (R. 6). As he approached the car, his wife and Jesse Lee Carlton ran from the garage to the tractor (R. 6). When asked who the people were that ran to the tractor, petitioner said they were his children (R. 6). The officers turned on the car lights and saw that petitioner's wife and Carlton had five one-gallon whiskey jugs at the front of the tractor (R. 6). The officers jumped out of the car, and as they did so, petitioner's wife and Carlton began to break the jugs (R. 6). The officers seized one jug of whiskey, and petitioner's wife and Carlton (R. 6, 7). A five-

gallon jug with wet stopper containing a teaspoonful of whiskey was found in a nearby tool shed, and a funnel, wet with whiskey, was found in front of the tractor (R. 11). No revenue stamps or parts of revenue stamps were found (R. 10, 11). When asked by the officers, petitioner denied possession or ownership of the whiskey and asserted that it belonged to his wife and Carlton who "were out there pouring it up" (R. 10). At the conclusion of this testimony the government rested.

Petitioner did not testify in his own defense but introduced a plot of his premises and the surrounding area. His only witness, a surveyor, testified that the area was open, that there were no fences, and that the premises were open to the street and the public (R. 20–28).

DISCUSSION

1. Petitioner's attack on the sufficiency of the evidence is without merit. The evidence in this case is essentially the same as that which supported the previous verdict of guilty returned against the petitioner. Though the court below, in reversing the previous conviction for improper argument, stated (249 F. 2d 295, 297) "that the evidence was far from conclusive," we believe that there was sufficient evidence in this case to warrant a finding by the jury that the illegal whiskey was within the dominion and control of petitioner, and thus in his possession within the purview of 26 U.S.C. (Supp. V) 5008(b)(1), 5642. The evidence showed that the nontax-paid whiskey was discovered on petitioner's premises in front of his tractor which stood between his house

and garage. When the officers arrived, petitioner was walking toward them from the area in which the tractor was parked. When two figures ran from the garage to the tractor, petitioner falsely told the officers that the two in front of the tractor were his children. He told the officers that the whiskey belonged to his wife and Carlton, and he admitted that he knew they were on his premises "pouring it up" (R. 10). In all the circumstances, the jury had the right to conclude that petitioner was more actively involved than he admitted.

2. Petitioner complains of the argument of government counsel in this case. It should be noted that, except as noted, the remarks complained of now were not the subject of objection below although counsel did complain strongly when the United States Attorney, in referring to petitioner's claim that his wife and Carlton owned the whiskey, spoke of him as the man behind the gun (R. 61–64). Moreover, the record here does not include the argument by petitioner's attorney.[1] Under these circumstances, courts of appeals have held, where it affirmatively appears that the remarks of government counsel were in response to those by defense counsel, that it is impossible to assay the alleged error in the prosecutor's remarks. See *Johnson* v. *United States,* 126 F. 2d 242, 248–249 (C. A. 8); *United States* v. *Dilliard,* 101 F. 2d 829, 837 (C. A.

[1] The United States Attorney who tried the case advises that a record of the defense counsel's summation was not made at the time of the trial. We are further advised that the prosecutor had the opening and closing argument in summation, that the opening argument was waived, the defense summation was made, and government counsel concluded.

2), certiorari denied, 306 U.S. 635; *Murphy* v. *United States,* 39 F. 2d 412, 414 (C. A. 8); *Vause* v. *United States,* 53 F. 2d 346 (C. A. 2), certiorari denied, 284 U. S. 661; *Landay* v. *United States,* 108 F. 2d 698, 706 (C. A. 6), certiorari denied, 309 U.S. 681. We discuss the challenged remarks *seriatim.*

a. In the beginning of his argument, the United States Attorney told the jury that it was his duty to present enough evidence to satisfy the jury beyond a reasonable doubt but he did not believe it his job to present a "repetition of the same thing with different officers * * *" who were available at the courthouse and "who could have been called by the defendant if the defendant had cared to call them" (R. 55). Then, after stating that the jury could assume that the testimony of the sheriff was truthful, he said that if there had been any doubt about the testimony "there would have been no reluctance on the part of these counsel to have put those officers up there to have seen if they could find any discrepancy in the testimony * * *" (R. 55). When the entire record is read it appears that the statement, contrary to petitioner's contention that it chastises him for failing to call those officers as witnesses, merely attempted to show to the jury the truthfulness of the sheriff's testimony. Petitioner himself must have initially thought this too, because he did not object to the statement.

b. After talking about the principle of aiding and abetting, the United States Attorney stated:

> * * * And it's a good thing it's there, because you take a big operator and a smart one, and one that's got money enough—and this, incidentally,

> is the first time that I have ever known of a nice plat of the premises coming into a Courthouse where I have tried a liquor case, either for or against the man in the liquor business.

After objection by petitioner's counsel to the statement as to experience in other cases, the United States Attorney said, "I apologize to Defendant's Counsel and to the Court. I probably shouldn't make that observation." The court then instructed the jury to disregard the remark (R. 60). The apology and the instruction removed any error in this remark. Standing by itself, we do not believe that it calls for reversal.

c. The United States Attorney then continued (R. 60):

> Thank you, sir, I say to you, Members of the Jury, that this case has been defended hard. Every effort has been made to clear this defendant—as ought to be, that's the duty of the lawyers—this defendant can afford to have refinements in the conduct of the search after the truth. If he's in that kind of money position, er, then he's certainly entitled to do it.

This is the comment to which most serious objection is now made. While an objection to the remark was not made at the trial, an extensive argument concerning the propriety and prejudicial effect of the comment was presented to the court below. The Court of Appeals did not specifically pass upon the issue but, in effect, indicated in its opinion (Pet. App. 21) that, in totality, the argument was not so inflammatory as to warrant the conclusion that it prejudiced the jury in its deliberations.

The government, however, after a complete review of the record, feels constrained to confess error. This comment by government counsel does not appear to be responsive to the defense summation. And the remark, insofar as it is a comment on the manner of the defense of the case and the petitioner's "money position," is clearly improper in that it raises matters having nothing to do with the guilt or innocence of the petitioner, and does not conform with the standards imposed upon government counsel by the rulings of this Court. See *Viereck* v. *United States*, 318 U. S. 236, 247–248; *Berger* v. *United States*, 295 U. S. 78, 88; *Read* v. *United States*, 42 F. 2d 636 (C. A. 8). The government also believes that, when the error is considered in the light of the entire proceeding—including the nature of the proof, and the prior remarks by government counsel—we cannot properly contend that the petitioner received a fair trial, or that the error in commenting on the petitioner's financial ability to afford a vigorous and "refined" defense was not likely to influence the jury improperly in its deliberations.[2] This is especially the case where the action had been previously reversed because of improper remarks of government counsel.

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[2] In argument in his petition, petitioner uses the phrase "big, rich, nigger operator" (Pet. 16). By setting this phrase forth in quotes, the petitioner implies that the phrase is a direct quote from the record. This is not true. The United States Attorney at no time used derogatory language regarding petitioner's race. In describing the incident when petitioner was arrested, Sheriff Johnson used the word "negro," but did several times say "nigger."

CONCLUSION

For the foregoing reasons, the United States does not oppose the granting of the petition for a writ of certiorari, and the reversal of the judgments below.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

FEBRUARY 1959.

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